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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CYNTHIA L. CZUCHAJ, individually
and on behalf of all others similarly
situated, et al.,

Plaintiffs,

vs.

CONAIR CORPORATION, a Delaware
corporation,

Defendant.

Case No.: 13-cv-1901-BEN (RBB)

**ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Before this Court is a Motion for Class Certification, filed by Plaintiffs Cynthia Czuchaj, Angelique Mundy, Barbara McConnell, and Patricia Carter. (Docket No. 108.) Respectively, Plaintiffs are residents of California, Pennsylvania, Michigan, and New York. (Mot. 2.) Each allege that they purchased a Conair hair dryer that malfunctioned. (Mot. 2.) Now that this case has been pending for two years, Plaintiffs seek to certify a class of potentially 3.3 million.

BACKGROUND

Defendant Conair Corporation sells the Infiniti Pro 1875 Watt hair dryer that is at issue in this case. The hair dryer is identified by a model number beginning with "259" or "279". The Court refers to the hair dryer as "Model 259" for consistency. According

1 to Conair, the Model 259 was designed by a manufacturer in China. (Opp'n 3.) Conair
 2 contracts with various manufacturers to build the hair dryers. (Opp'n 3-4.) Conair sells
 3 the hair dryers to retailers and the retailers then resell the products to consumers. (Opp'n
 4 5.) Between December 2009 and August 2015, over 3.3 million Model 259 dryers were
 5 sold to retailers. (Opp'n 5.)

6 Plaintiff Czuchaj purchased the Model 259 hair dryer at a Sam's Club store in
 7 California. (SAC ¶ 19; Opp'n Ex. 21.) After owning and using the product for
 8 approximately ten months, the Model 259 malfunctioned during use and began emitting
 9 flames from the handle where the cord connects to the device. (SAC ¶ 20.) Czuchaj
 10 dropped the dryer onto the floor, but it did not stop malfunctioning until she unplugged
 11 the device. As a result, a small area of her bathroom carpet was burned. (SAC ¶ 20.)

12 Plaintiff Mundy purchased a Model 259 from a Wal-Mart store in Pennsylvania.
 13 (SAC ¶ 21; Opp'n Ex. 22.) Mundy was using her Model 259 as she usually did in the
 14 two years that she owned the product when it ejected several hot coils onto her head and
 15 blouse. (SAC ¶ 21.) One of the hot coils fell down Mundy's blouse and caused a burn
 16 and scar on her chest. (SAC ¶ 21.)

17 Plaintiff McConnell purchased a Model 259 from a Target in Ohio. (SAC ¶ 22;
 18 Opp'n Ex. 24.) While using the Model 259 to dry her hair, "flames began emanating
 19 from the cord." (SAC ¶ 22.) Immediately, McConnell tossed the product into her sink,
 20 but the flames did not stop until she unplugged the device. (SAC ¶ 22.) Her sink
 21 sustained damage as a result. McConnell owned the Model 259 for approximately one
 22 and a half years before it malfunctioned. (SAC ¶ 22.)

23 Plaintiff Carter bought her Model 259 from an Ulta Beauty store in New York.
 24 (SAC ¶ 23.) Carter claims that she was using the product to dry her hair when it
 25 "exploded, burst into flames and ejected a hot coil which was lodged into [her] skull."
 26 (SAC ¶ 23.) Carter's hair caught fire as a result, and she suffered burns to her scalp.
 27 (SAC ¶ 23.) Carter was treated at Mount St. Mary's hospital on November 2, 2013.
 28 (SAC ¶ 23.)

1 Plaintiffs initiated this strict products liability class action on August 15, 2013. A
 2 First Amended Complaint was filed on December 17, 2013. (Docket No. 9.) The
 3 operative Second Amended Complaint was filed on June 2, 2014. (Docket No. 41.)
 4 Plaintiffs primarily allege that the Model 259 was defectively designed and that Conair
 5 was aware of the defect yet failed to warn consumers.

6 Plaintiffs seek to certify the following:

7 A class consisting of all “consumers” as defined by Cal. Civ. Code §
 8 1761(d) and other states substantially similar consumer protection statutes,
 9 residing in the United States who purchased, not for resale, CONAIR Hair
 10 Dryers at any time in the four, six, and ten years preceding the filing of this
 11 action (the “Nationwide Class”). The Nationwide Class seeks certification
 12 of claims based on the UCL, Cal. Bus. & Prof. Code §17500 *et seq.*
 13 (“FAL”), the CLRA, Strict Products Liability—Product Defect, and/or Strict
 14 Products Liability—Failure to Warn, Breach of Implied Warranty, and
 15 Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*

16 (SAC ¶ 60.)¹

17 Plaintiffs also seek certification of California, Michigan, Pennsylvania, Ohio, and
 18 New York subclasses that raise state consumer protection violations. Alternatively,
 19 Plaintiffs ask this Court to certify five separate state classes. Plaintiffs seek restitution
 20 and equitable relief. (Mot. 1, 23-24.)

21 **LEGAL STANDARD**

22 Federal Rule of Civil Procedure 23 governs federal class action lawsuits. A
 23 plaintiff seeking to certify a class must first meet all of the requirements under Rule 23(a)
 24 and must also satisfy at least one of the prongs of Rule 23(b).

25 Under Rule 23(a), members of a class may sue as representative parties on behalf
 26 of all members only if:

27 _____
 28 (1) the class is so numerous that joinder of all members is impracticable; (2)
 29 there are questions of law or fact common to the class; (3) the claims or
 30 defenses of the representative parties are typical of the claims or defenses of

¹ In their Motion, Plaintiffs do not define the class they seek to certify.

1 the class; and (4) the representative parties will fairly and adequately protect
 2 the interests of the class.

3 Fed. R. Civ. P. 23(a). Upon meeting the Rule 23(a) requirements, a plaintiff must then
 4 present evidentiary proof that one of the 23(b) prongs has been satisfied. *Comcast Corp.*
 5 *v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

6 Under Rule 23(b)(2), a court may certify a class where “the party opposing the
 7 class has acted or refused to act on grounds that apply generally to the class, so that final
 8 injunctive relief . . . is appropriate respecting the class as a whole.” A class may be
 9 certified under Rule 23(b)(3) if the court finds that “questions of law or fact common to
 10 class members predominate over any questions affecting only individual members, and
 11 that a class action is superior to other available methods for fairly and efficiently
 12 adjudicating the controversy.”

13 The party seeking certification under Rule 23(b)(3) must also provide a “workable”
 14 class definition by showing that members of the class are identifiable. *Connelly v. Hilton*
 15 *Grand Vacations Co., LLC*, 294 F.R.D. 574, 576 (S.D. Cal. 2013) (citation omitted). In
 16 other words, a plaintiff must show that the members of the class are ascertainable in order
 17 to proceed pursuant to Rule 23(b)(3). *Backhaut v. Apple, Inc.*, No. 14-cv-2285, 2015 WL
 18 4776427, at *4 (N.D. Cal. Aug. 13, 2015) (slip copy) (citations omitted).

19 Rule 23 is not a “mere pleading standard” and a party seeking class certification
 20 “must affirmatively demonstrate his compliance with the Rule.” *Wal-Mart Stores, Inc. v.*
 21 *Dukes*, 131 S. Ct. 2541, 2551 (2011). It may be necessary for a court to “probe behind
 22 the pleadings before coming to rest on the certification question.” *Id.* (citation omitted).
 23 In making the class certification determination, a court is required to engage in “rigorous
 24 analysis.” *Id.* That analysis frequently entails “some overlap with the merits of the
 25 plaintiff’s underlying claim.” *Id.*

DISCUSSION²

Plaintiffs seek to certify a Nationwide Class and five state subclasses under Rule 23(b)(2) and (b)(3). Alternatively, Plaintiffs seek to certify five state classes.

I. Standing

“In a class action, standing is satisfied if at least one named plaintiff meets the requirements.” *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citation omitted). At least one plaintiff must both meet the constitutional standing requirements and show that “he has standing for each type of relief sought.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

To establish Article III standing, a plaintiff must show injury-in-fact, causation, and redressability. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) (“Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”). The plaintiff bears the burden of establishing the Article III requirements in the same “manner and degree of evidence required at the successive stages of litigation.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). “On a motion for class certification, this means Plaintiffs must show standing ‘through evidentiary proof.’” *Backhaut*, 2015 WL 4776427, at *5 (citing *Comcast Corp.*, 133 S. Ct. at 1432); *see also Nelsen v. King Cnty.*, 895 F.2d 1248, 1249 (9th Cir. 1990) (“Standing is a jurisdictional element that must be satisfied prior to class certification.”).

Here, each Plaintiff has established the injury-in-fact requirement by showing that each received a Model 259 that malfunctioned during ordinary use. In addition, they alleged either personal injury or property damage. Had the Model 259 not malfunctioned, either by hot coils ejecting from the barrel or flames emanating from the

² As an initial matter, the Court GRANTS Plaintiffs' Request for Judicial Notice (Docket No. 108-13) and Defendant's Request for Judicial Notice (Docket No. 136). The Court DENIES Plaintiffs' Request to judicially notice the Declaration of Stuart M. Eppsteiner (Docket No. 148), which was filed in an unrelated action.

1 handle and cord, the named Plaintiffs would not have been injured. Finally, this Court
 2 has the ability to provide Plaintiffs relief.

3 Conair challenges standing in only one instance: Plaintiff McConnell's ability to
 4 represent the Michigan Class. Plaintiffs did not respond to Conair's challenge. The
 5 Michigan Class, either as a separate class or subclass, is defined as "all consumers who
 6 purchased, not for resale, and/or suffered injury as a result of use for its intended purpose,
 7 CONAIR Hair Dryers in the State of Michigan." (SAC ¶ 60(b).) Plaintiff McConnell
 8 asserts that she purchased the Model 259 in Ohio. The record is devoid of any
 9 allegations, much less "evidentiary proof," that might show McConnell was injured in
 10 Michigan. McConnell therefore does not have standing to represent the Michigan Class.

11 In conclusion, the named Plaintiffs have standing to represent the Nationwide
 12 Class. Additionally, Plaintiff Czuchaj has standing to represent the California Class.
 13 Plaintiff Mundy has standing to represent the Pennsylvania Class. Plaintiff McConnell
 14 has standing to represent the Ohio Class. Plaintiff Carter has standing to represent the
 15 New York Class.

16 **II. Nationwide Class Certification**

17 As the Rule 23(b) analysis in this case overlaps with some of the Rule 23(a) factors
 18 and is dispositive, the Court need not address the 23(a) factors.

19 A. Rule 23(b)(3) Damages Class

20 Plaintiffs seek certification of a Nationwide Class asserting breach of implied
 21 warranty claims under state common law and the Magnuson-Moss Warranty Act, and
 22 strict products liability for design defect and failure to warn. Conair argues that
 23 substantive differences in state strict liability laws exist so that individual questions
 24 predominate over any common questions. The Court agrees.

25 Plaintiffs contend that the Model 259 was defectively designed, as exemplified by
 26 the coil and cord defects. In Plaintiffs' Reply, Plaintiffs confirm that they claim all
 27 Model 259 dryers have the coil defect. (Reply 4, 12.) However, Plaintiffs do not assert
 28 that all Model 259 dryers have the cord defect. Rather, they assert that the Model 259s

1 manufactured by the Sun Luen factory (one of at least three factories that manufacture the
 2 Model 259) prior to July 2013 had a cord design defect. (Reply 3.) Plaintiffs represent
 3 that the cord defect is caused by a strain relief (which protects the cord as it connects to
 4 the handle) that is too short. They argue that the coil defect, on the other hand, is caused
 5 by excessive vibrations and poor mica card materials. Thus, Plaintiffs assert two
 6 different design defects, only one of which applies to all Model 259s.

7 Also, the statutes of limitation for products liability actions vary among the states.
 8 *See, e.g.*, Cal. Civ. Proc. Code §§ 335.1, 338; N.Y. C.P.L.R 214; Ohio Rev. Code Ann. §
 9 2305.10(A). Even in California, products liability claims for personal injury are barred
 10 after two years, while claims for property damage are barred after three years. *See* Cal.
 11 Civ. Proc. Code §§ 335.1, 338.

12 Interestingly, Plaintiffs raise products liability claims which provide for the
 13 recovery of property damage and personal injury, yet expressly exclude recovery for
 14 personal injury. There is no estimate for how many members of the putative class would
 15 be required to opt out in order to protect their claims for personal injuries. Also,
 16 throughout Plaintiffs' filings, they repeatedly seek "restitution" and propose to calculate
 17 damages based upon the full refund price of the Model 259. Upon review of the
 18 operative complaint and Plaintiffs' briefs, it appears that they do not actually seek to
 19 recover for property damage. If Plaintiffs do in fact wish to recover for property damage,
 20 such an award would apply to only a subset of the class. *But see Keegan v. Am. Honda*
 21 *Motor Co.*, 284 F.R.D. 504, 530 (C.D. Cal. 2012) (courts should accept plaintiff's theory
 22 as it is stated). Thus, the unequal application of an award for property damages generates
 23 the need for more individual questions.³

24 The products liability claims here call for a disjointed class action. *See Zinser v.*
 25 *Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (although products

27 28 ³ This case is distinguishable from *Beck-Ellman v. Kaz USA, Inc.*, 283 F.R.D. 558, 565,
 569 (S.D. Cal. 2012), where the named plaintiffs only sought restitution.

1 liability class actions are not prohibited *per se*, such cases usually involve an abundance
 2 of individual issues). The Court therefore declines to certify the product liability claims,
 3 as they raise individualized inquiries which predominate over common questions.

4 However, common questions related to Plaintiffs' implied warranty claims
 5 predominate over individual questions. Whether the Model 259 was defective and
 6 whether the implied warranty of merchantability was breached are two questions
 7 appropriate for a class action. *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d
 8 1168, 1173-74 (9th Cir. 2010). Further, Conair raises no challenge to Plaintiffs'
 9 nationwide breach of implied warranty claims.

10 In this instance, a class action is the superior method of litigation because the
 11 relatively small size of each class members' claim would prevent them from seeking
 12 relief individually. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)
 13 ("Where it is not economically feasible to obtain relief within the traditional framework
 14 of a multiplicity of small individual suits for damages, aggrieved persons may be without
 15 any effective redress unless they may employ the class-action device.").

16 Accordingly, the Court certifies the Nationwide Class, modified and defined as
 17 follows: "All persons who purchased either a model 259 or 279 Infiniti Pro 1875 Watt
 18 hair dryer, between August 15, 2009 and the present, sold by Defendant Conair
 19 Corporation directly or through numerous retailers for primarily personal, family, or
 20 household purposes, and not for resale."

21 B. Rule 23(b)(2) Injunctive Relief Class

22 Plaintiffs also seek to certify the Nationwide Class under Rule 23(b)(2), seeking
 23 injunctive or declaratory relief and restitution.

24 Rule 23(b)(2) "does not authorize class certification when each class member
 25 would be entitled to an individualized award of monetary damages." *Dukes*, 131 S. Ct. at
 26 2257.

27 The Nationwide Class, as certified by the Court, may be entitled to restitution.
 28 However, an award of restitution would be based upon the number of Model 259 dryers

1 bought by each class member. Thus, questions of each class member would be required
 2 in order to determine how much monetary damages should be awarded. Accordingly,
 3 Plaintiffs' Motion to certify the Nationwide Class under Rule 23(b)(2) is **DENIED**
 4 insofar as Plaintiffs seek to recover restitution. *See Ries v. Ariz. Beverages USA LLC*,
 5 287 F.R.D. 523, 541 (N.D. Cal. 2012) (denying class certification under Rule 23(b)(2)
 6 because case required an individualized inquiry into the award of monetary restitution).

7 III. Subclass Certification

8 Although Plaintiffs' Motion lacks any argument for the certification of subclasses
 9 raising consumer protection claims, Conair argues the subclasses cannot satisfy the
 10 predominance or commonality requirements.

11 A. California

12 Plaintiff Czuchaj asks to represent California plaintiffs raising claims under the
 13 False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*, Consumer
 14 Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1770, *et seq.*, and Song-Beverly
 15 Warranty Act, Cal. Civ. Code §§ 1792, *et seq.*

16 Conair argues that Plaintiffs' unfair competition law and CLRA claims fail because
 17 Conair's alleged misstatements amount to mere puffery which is not actionable under the
 18 statutes. However, Conair's argument goes too far into a merit analysis than this stage of
 19 litigation allows. *See Moore v. Apple*, ---F.R.D---, 2015 WL 4638293, at *4 (N.D. Cal.
 20 Aug. 4, 2015) ("Rule 23 grants courts no license to engage in free-ranging merits
 21 inquiries at the certification stage.") (citing *Amgen Inc. v. Conn. Ret. Plans & Trust*
 22 *Funds*, 133 S. Ct. 1184, 1194-95 (2013)). Conair raises no challenge against the Song-
 23 Beverly Warranty Act.

24 Courts use an objective test to assess injury under the FAL and CLRA. *Bruno v.*
25 Quten Research Inst., LLC, 280 F.R.D. 524, 534 (C.D. Cal. 2011). Pursuant to the
 26 objective test, "injury is shown where the consumer has purchased a product that is
 27 marketed with a material misrepresentation, that is, in a manner such that 'members of
 28 the public are likely to be deceived.'" *Id.* Thus, where the misrepresentations are found

1 to be material, individual inquiries are not necessary. Here, Plaintiffs allege the
 2 packaging of the Model 259 was the same or substantially similar. They assert that the
 3 advertisements and packaging did not warn of the alleged defects. As Czuchaj alleges
 4 that she viewed the same advertisements as the California Class, there is no variation in
 5 what advertisements had been seen. Accordingly, the common question of whether
 6 Conair's advertisements were deficient outweighs any individual questions. The
 7 commonality and predominance requirements are met. The Court **GRANTS** Plaintiffs
 8 motion to certify the California subclass under Rule 23(b)(3).

9 **B. Pennsylvania**

10 Plaintiff Mundy asks to represent the Pennsylvania subclass, asserting a claim
 11 under the state's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann.
 12 §§ 201-1, *et seq.*

13 Under Pennsylvania's consumer protection statute, a plaintiff must prove
 14 justifiable reliance. *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 221-22 (3d Cir. 2008). As
 15 such, each member of the putative Pennsylvania Class would be required to show that he
 16 or she justifiably relied upon Conair's misrepresentations. Individual questions would
 17 therefore predominate over any common questions. *See Beck-Ellman*, 283 F.R.D. at 570
 18 (denying certification to a class raising claim under Pennsylvania's consumer protection
 19 statute).

20 The Court therefore **DENIES** the motion to certify the Pennsylvania subclass.

21 **C. New York**

22 Plaintiff Carter asks to represent the New York subclass, asserting a claim under
 23 New York's General Business Law § 349. Under section 349, courts use an objective
 24 standard to determine whether Conair's allegedly deceptive practices were "likely to
 25 mislead a reasonable consumer acting reasonably under the circumstances." *Ebin v.*
 26 *Kangadis Food Inc.*, 297 F.R.D. 561, 568 (S.D.N.Y. 2014) (quoting *Leider v. Ralfe*, 387
 27 F. Supp. 2d 283, 292 (S.D.N.Y. 2005)). Similar to the California subclass, the objective
 28 standard presents a common question that is proper for class litigation. Accordingly, the

1 Court **GRANTS** Plaintiffs' motion to certify the New York subclass under Rule 23(b)(3).

2 **D. Ohio**

3 Plaintiffs failed to bring a cause of action under Ohio's consumer protection laws.

4 The Court therefore **DENIES** Plaintiffs' motion to certify the Ohio subclass.

5 **CONCLUSION⁴**

6 The Court therefore **GRANTS in part** Plaintiffs' Motion for Class Certification.

7 The Court certifies the Nationwide Class, as modified, and the California and New York
8 subclasses. Plaintiffs' Motion is **DENIED** as to the proposed Michigan, Ohio, and
9 Pennsylvania subclasses.

10 **IT IS SO ORDERED.**

11
12 Dated: November /1, 2015

13 
HON. ROGER T. BENITEZ
United States District Judge

27
28 ⁴ The Parties filed numerous objections to evidence. The objections are overruled to the extent they are inconsistent with this Court's Order.